No. 6482

In the

United States Circuit Court of Appeals

For the Ninth Circuit

GREAT NORTHERN RAILWAY COMPANY, a corporation
Appellant
vs.
W. G. SHELLENBARGER
Appellee

Appellant's Brief

Upon Appeal from the United States District Court for the District of Oregon

CHARLES A. HART
FLETCHER ROCKWOOD
CAREY, HART, SPENCER & MCCULLOCH
1410 Yeon Building, Portland, Oregon
Attorneys for Appellant

SUBJECT INDEX

TABLE OF CASES AND STATUTES CITED

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STATEMENT OF THE CASE

The judgment appealed from in this action is one for damages for personal injuries. Appellee, the plaintiff below, was a passenger on one of appellant's trains. He stepped or fell through an open vestibule while the train was in motion.

The accident happened as the train slowed down for the purpose of taking a siding at a station in eastern Montana. One of the train crew had opened a vestibule door preparatory to alighting for the

purpose of closing the switch. He was standing at the opening but was not observed by plaintiff; it is plaintiff's contention that a sudden lurch of the train caused him to fall through the opening.

The complaint was drawn upon the theory that the train had taken the siding at an excessive rate of speed and that the result was an unusual and extraordinary lurch. This, together with the charge that the vestibule door was improperly left open without warning to plaintiff, was the negligence relied upon in the complaint. (Transcript of Record, pp. 5-6, 33).

At the opening of the trial plaintiff conceded that the train had not reached the siding at the time of the accident, and the court permitted an amendment changing the charge of negligence to excessive speed of the train "at a time when the train was about to enter a crossover." This was explained by counsel in the following words:

> "I wish to amend by stating that as they were about to take the siding and slowing down the train for the purpose of later entering the siding, they so carelessly and negligently operated the train as to cause it to give an unusual and unnecessary lurch, thereby causing the plaintiff to lose his balance and fall." (Transcript, p. 33.)

In response to a question from the court, counsel for plaintiff added:

> "the lurch must have been caused by the improper operation of the train for the purpose of

slowing down to take the crossing." (Transcript, p. 33).

The court submitted the issues of negligence to the jury, overruling a motion for a directed verdict, and there was a verdict of $18,480 upon which judgment was entered. Appellant moved for a new trial on the ground that certain charges of negligence should have been withdrawn from the jury, and upon the further ground that the verdict was excessive. The learned judge who presided at the trial died before passing on the motion and the motion was later disposed of adversely to defendant by another judge of the court, under the provisions of Section 28-776, United States Code Annotated.

Appellant seeks reversal of the judgment and the dismissal of the action on the ground that there was no substantial evidence to go to the jury upon any of the issues of negligence involved; the trial court should have granted the motion of defendant to direct a verdict. Appellant also assigns error in the failure to withdraw certain charges of negligence from the jury and in the failure of the trial court to set aside the verdict as excessive. If it can be said that there is some evidence of negligence to support one or more of plaintiff's charges so that the trial court was right in not directing a verdict for defendant, the judgment should, nevertheless, be set aside and a new trial granted because of these errors.

SPECIFICATIONS OF ERROR

1. The District Court erred in denying the defendant's motion for a directed verdict in its favor, as follows:

> "The defendant at this time moves the Court for a directed verdict in its favor on the ground that there is no evidence of any excessive speed, and no evidence of any excessive or unusual lurch of the train; on the further ground that the evidence fails to prove it was negligent in any particular alleged with respect to the condition of the vestibule, as to lights, opening, or method of safeguarding the vestibule; that there is no evidence from which it can be determined that any alleged act of the defendant was the proximate cause of plaintiff's injury—of the accident and his resulting injury. * * * " (Record, pp. 26, 328).

2. The District Court erred in refusing to give to the jury defendant's requested instruction No. II, as follows:

> "There is no evidence from which you may find that the speed of the train was excessive and negligent." (Record, p. 27).

3. The District Court erred in refusing to give to the jury defendant's requested instruction No. III, as follows:

> "I charge you that there is no evidence presented in this case that there was a lurch of the train at the moment that the plaintiff fell from the train. The entire matter covered by the allegations relating to the lurching of the

train is withdrawn from your consideration." (Record, pp. 27-28).

4. The District Court erred in refusing to give to the jury defendant's requested instruction No. IV, as follows:

> "I direct you that there is no evidence from which you can find that the defendant was at fault in respect to the condition of the vestibule and the methods used for guarding the open vestibule. Consequently all questions of negligence of the defendant on the condition of the vestibule and the methods used to protect the opening are withdrawn from your consideration." (Record, p. 28).

5. The District Court erred in refusing to give to the jury defendant's requested instruction No. IV-a, as follows:

> "I instruct you that there is no evidence in this record from which you can find that the trap door of the vestibule, at the place where the accident occurred, was raised; in other words, there is no evidence that the steps were uncovered." (Record, p. 28).

6. The District Court erred in denying the defendant's motion for a new trial, based upon the ground, among others, that the damages awarded by the verdict of the jury to the plaintiff are excessive and appear to have been given under the influence of passion and prejudice. (Record, pp. 18, 22, 25).

ARGUMENT

Appellant's first specification of error goes to the merits. Appellant believes that there was no substantial evidence upon any of the charges of negligence relied upon and that the trial court should have directed a verdict for defendant. The remaining specifications of error are assigned as grounds for setting aside the judgment and granting a new trial, upon the assumption that some evidence was adduced which justified submission of the case to the jury. We shall consider first the question presented by the first specification of error.

I.

The charges of negligence finally relied upon by plaintiff and to which the plaintiff's evidence was addressed, are the following:

1. That the train was operated at an excessive rate of speed in view of the fact that it was approaching a point where it would leave the main line and go upon a side track.
2. That the train was operated in such manner as to cause an unusual and unnecessary lurch.
3. That the vestibule door and steps of a car were allowed to remain open and unguarded, without proper lighting, and without warning or notice to plaintiff, at a time when the train was in rapid motion between stations.

The testimony offered in support of these allegations makes the accident to plaintiff one extremely difficult of explanation. He fell or was thrown or

inadvertently stepped through a side vestibule doorway, notwithstanding the fact that the trap or platform covering the steps was in place and a brakeman stood looking out the vestibule doorway in a position at least to partly block the opening. Up to the time of the amendment at the trial, plaintiff's explanation of the accident was that the sudden side sway caused by the excessive speed at which the train took the side track threw him from the train. The statement upon which the case went to the jury was that plaintiff lost his balance because of a sudden lurch of the train which caused him to fall *forward;* there was no testimony of any swaying which could possibly explain plaintiff's actions as he moved from his place of safety across the trap or platform and stepped or fell from the train.

The case turns upon the testimony of plaintiff himself, supplemented by the testimony of the brakeman who stood in the vestibule. Other testimony was offered in attempted corroboration as to the lurch of the train and the opening of the vestibule, but for reasons which we shall presently state, this testimony was without evidentiary value.

Viewed in the light most favorable to plaintiff, the proof of negligence upon which the verdict rests, is as follows:

Plaintiff had been riding in the rear car of the train and late in the evening started forward to his

own coach intending to go to bed. As he walked through the rear car he noticed the usual swaying of the train, stating that "I had to be careful about that." When he got to the vestibule between the rear car and the next preceding car, he noticed what seemed to be "more than the usual movement to the train", and when he was passing through the vestibule and was about to go into the next coach, he says there was a sudden lurch of the train that threw him; his statement was, "I lunged forward." He had no other recollection of how he left the train, but was conscious of going through space without knowing whether he had come in contact with either side of the vestibule or with any part of the train. The vestibule was well lighted, but plaintiff did not observe any open vestibule door nor did he notice that a brakeman stood in the opening. (Record, pp. 97-100, 279). In explaining the lurch referred to he said (Record, pp. 99-100):

> "Take the ordinary swaying of the car, you can balance yourself as you walk along, but this movement of the car was such that you couldn't protect yourself, that is, it was violent, I would call it,—well, different; was much stronger—well, it wasn't a swaying; it was a kind of a lurch. You lose your—you can't gain your—you can't gain your balance for a short time."

In response to careful questioning at the time of a medical examination before the trial, plaintiff's explanation of the accident was that he was walk-

ing along the aisle of a moving train, and suddenly remembered nothing until he awoke in a hospital. (Record, pp. 169, 184, 186).

The brakeman who witnessed the accident had been seated in the observation car of the train. When the rounding of a curve indicated the approach to Saco station, at which the train was to take a siding to allow a westbound train to pass, the brakeman arose and went forward to the rear end of the next preceding car. He opened the vestibule door on the left side but kept the platform or trap (covering the car steps) down; he used this particular opening and not the vestibule door of the adjacent observation car, *because the latter was so constructed that he could not have opened the vestibule door without first raising the platform or trap.* His purpose was to drop off the train as soon as the car passed over the switch, swinging the vestibule door shut behind him, so that he might close the switch in the main line after the train had cleared it. (Record, pp. 273, 281).

While waiting for the train to enter the side track the brakeman stood facing out and looking forward toward the engine of the train, his body blocking the opening. His left hand rested on the brake lever on one side, and his right hand, raised to the level of his shoulder, extended across the opening and rested against the door on the other side. (Record, p. 281).

While in this position he suddenly felt a hand laid on his right forearm. His arm was not gripped but there was just ordinary pressure such as might be used merely to attract attention. The brakeman dropped his arm so that he might look around and as he did so a figure walked past him and stepped off into the dark. The brakeman made an effort to reach for him but could not get hold of him. There was no indication that the man was falling; his arms were not extended and he gave no impression of attempting to recover his balance. His movement was "just as though anyone would walk along." (Record, pp. 282-283).

There was a dome light on the left side of the vestibule where the accident happened, as well as on the right side. Both of these lights were burning. (Record, p. 279). The photographs of the car vestibule, Exhibits C, D, E, F, G, H, I and J, make clear that it would be almost impossible for anyone to pass another person standing in the opening unless the latter stepped aside or changed his position to some extent; at least, a body could not be thrown through the opening without striking against anyone standing in the doorway.

In examining this evidence to determine whether it makes out a *prima facie* case of negligence, two rules particularly applicable in the federal courts are to be kept in mind:

1. The case is not to be submitted to the jury merely because some evidence has been introduced by the party having the burden of proof, unless that evidence be of such character that it would warrant the jury in finding a verdict in favor of that party. Where all of the substantial evidence is one way, the question presented is one of law and the trial court should direct a verdict. A scintilla of evidence will not support a verdict in the United States courts.

Larabee Flour Mills Co. v. Carignano, 49 Fed. (2nd) 151.

Gunning v. Cooley, 281 U. S. 90.

A. B. Small Co. v. Lamborn & Co., 267 U. S. 248.

Improvement Company v. Munson, 14 Wallace 442.

2. Upon a motion to direct a verdict all conflicts in the evidence are to be resolved against the defendant. But this does not mean that the testimony of a witness for defendant, not in conflict with plaintiff's evidence, can be disregarded. No different rule is applicable merely because such a witness may be an employe of the defendant, in the absence of circumstances justifying countervailing inferences or suggesting doubt as to the truth of the statements made, provided, of course, that the evidence is not of such a nature as fairly to be open to challenge as suspicious or inherently improbable.

Chesapeake & Ohio Ry. Co. v. Martin (decided April 13, 1931), 51 Sup. Ct. 453.

The single incident in plaintiff's story upon which a claim of negligence could possibly be based, is the lurching of the train when plaintiff in passing from the observation car to the adjacent sleeping car had reached the platform of the sleeping car. Instead of entering the car he walked or was thrown several steps to the left and through the open vestibule doorway in which the train brakeman was standing. The claim of negligence in opening the vestibule door and leaving it unlighted and unguarded is wholly unsupported by any proof other than the fact that plaintiff left the train through this opening, and this is completely answered by the uncontradicted testimony of defendant's witnesses. There was no attempt made to prove the allegations of excessive speed.

We are to determine, therefore, (a) whether there is any substantial evidence of a violent and unusual lurch which could be said to be at least presumptively negligent; (b) whether upon the entire record it can be said that there is any substantial evidence to support the claim that plaintiff fell or was thrown from the train by reason of the lurch referred to; and (c) whether there is anything in the fact that plaintiff actually left the train through the open vestibule doorway, in the circumstances shown by the record, to justify an inference of negligence in opening the doorway and making such an accident possible.

(a) Insufficiency of Evidence to Prove Negligent Handling of Train:

Plaintiff's description of the movement of the train to which he attributed his fall was "an unusual amount of movement"; "a sudden lurch" that caused him to lunge forward; a "violent" movement, causing him to lose his balance, but "it was not a swaying." (Record, pp. 97-98, 99-100).

These descriptive phrases when not related to some interruption in the normal operation of the train, are wholly inadequate to raise any presumption of negligence. Many cases emphasize the distinction between an accident to a passenger and an accident to the train. The rule of *res ipsa loquitur,* applicable in cases of accident to the train, does not supply the necessary *prima facie* proof of negligence where nothing more is shown than the fact of the injury to the passenger following some sudden lurch or jar in the movement of the train. Trains cannot be operated without sudden and unexpected jolts and lurches, and evidence proving simply that an injury was sustained as the result of an unexpected lurch or jerk, does not make out a case of negligence.

Nor is the situation helped by the descriptive adjectives used in characterizing the jerk or jar. Obviously, anyone who loses his balance and falls believes that the sudden movement responsible was "unusual" or "violent". Testimony of this kind from

the person injured adds nothing whatsoever to the fact of the injury, and where the occurrence itself—the fall resulting from an unexpected movement of the train—creates no presumption of negligence, the characterization of the movement as something unusually severe or even violent, adds nothing substantial upon which a verdict could rest. This was the holding of the Supreme Court in *Gulf M. & N. R. Co. v. Wells,* 275 U. S. 455. The statement of a brakeman who tripped as he was endeavoring to board a train, that the engine gave an unusual jerk, more severe than the brakeman had ever experienced, was said to be an opinion which under the circumstances had no substantial weight. A verdict based upon this alone was set aside.

It is universally recognized that sudden jolts and jars, often severe enough to cause one to lose his balance, are unavoidable in the operation of fast passenger trains, however skillfully they may be handled; in many cases recovery for injuries has been denied where the evidence showed nothing more than an injury resulting from an unexpected movement of this kind, even though characterized by the injured party as unusual or extraordinary or violent or even "terrific".

An illustrative case is *Norfolk & Western Ry. Co. v. Birchett,* 252 Fed. 512. A passenger had fallen or had been thrown from a chair in the dressing room

of a sleeping car, the result of which she described as a "terrific" or "violent" lurch of the train. The court said:

> "The foregoing summary makes it apparent that plaintiff's case rests wholly upon the fact that she fell, and her characterization, as a witness in her own behalf, of the car movement that caused the fall. Aside from the fact itself and the adjectives she uses, there is nothing of record which even suggests, much less tends to prove, that the train in question was improperly or unskillfully handled. * * * * * * * * * * * * * * *
>
> " * * * The fact that she fell, under circumstances not seriously in dispute, does not make out a *prima facie* case of negligence, and her characterization of the car movement which caused the fall adds nothing from which negligence can be legitimately inferred."

The distinction between an accident to the train, implying or creating a presumption of negligence, and an accident only to the passenger, is noted in the *Birchett* case in the following language:

> "In such case, where the accident is to the passenger, and not to the car or train, it has been held by courts of high authority that a presumption of negligence does not arise. (Citing cases). In the last named case (*Nelson v. Lehigh Valley R. Co.*, 50 N. Y. Supp. 63) it was said:
>
> "'But it does not follow as a logical conclusion that, because a passenger is shaken or disturbed in his seat by the movement or lurching of a car running upon a curved road, the imputation of negligence must necessarily arise.

> That a passenger may, in a greater or less degree, be shaken or jostled, under such circumstances, is a matter of common knowledge and experience. As an ordinary incident to railroad travel, it is a consequence of the operation of counteracting forces, and is to be expected to occur. The courts must take notice of that which is a matter of common knowledge or experience, and when the evidence fails to disclose the lack of the required measure of care, as judged by the light of such knowledge, in view of the attendant circumstances, it ought not to be left to the conjecture of a jury. The plaintiff must give some proof from which there may be a logical inference of negligence, and the mere happening of the accident is not sufficient for the jury'."

In *Delaney v. Buffalo R. & P. Ry Co.*, 109 Atl. (Penn.) 605, a passenger fell from her chair as the result of a lurch which she described as "terrific". The court held that no negligence arose from the fact of the accident even though caused by a sudden movement of the train which the injured person thought exceptionally severe. Quoting from the decision:

> "In the present case no defect was shown in the appliances of transportation or manner of operation; on the contrary, it affirmatively appeared that the track, train, and all appliances were in first-class condition, and the operation free from fault, and nothing happened to the track or train; so the burden of proving negligence rested upon the plaintiff, and it was not met. An injury to a passenger raises no presumption against the carrier, unless the acci-

> dent is connected in some way with the means of transportation. (Citing cases). And the situation is not changed by the fact that plaintiff's evidence describes the lurch or jolt as 'terrific'. That a passenger fell from her chair from the mere movement of the car of a fast train does not make out a *prima facie* case of negligence, and her mere characterization of the movement as a terrific or violent lurch adds nothing from which negligence can be legitimately inferred."

The same rule was applied by the Supreme Court of Washington in the case of *Valentine v. Northern Pacific Ry. Co.,* 70 Wash. 95, 126 Pac. 99. Plaintiff's case rested upon her testimony that there was a violent lurch of the train as the result of which the injury was sustained. The court in holding that the issue of negligent operation should have been taken from the jury, said:

> "Moreover, there was no evidence to sustain either charge. Mrs. Valentine testified that the car gave a violent lurch, but there was no evidence that the lurch was so violent as not to be accounted for except upon the theory that the roadbed was defective or that the train was improperly operated. It might have resulted from rounding a curve or passing a switch. Here again the rule of *res ipsa loquitur* has no application. That rule can only be invoked where the accident, in the light of ordinary experience, is not capable of explanation, except as resulting from negligence."

In *Wile v. Northern Pacific Ry. Co.,* 72 Wash. 82, 129 Pac. 89, the Supreme Court of Washington said:

> "The law cannot, however, blind itself to the common facts of every day experience; and it takes knowledge of the fact that with the highest care known to modern railroading the best-built Pullman or drawing room car will lurch and sway, bringing a risk of injury to the passenger, which he assumes, because scientific railroading knows no way to avoid it."

In *Norfolk & Western R. Co. v. Rhodes,* 63 S. E. (Va.) 445, the court held that testimony by plaintiff's witnesses that there was a rocking or lurching which was unusual and extraordinary, did not make a *prima facie* case of negligence. The court said:

> "In this case there is no direct proof of negligence, nor can negligence be reasonably presumed from the facts and circumstances disclosed by the record. It is a matter of common knowledge, as well as shown by the record, that trains or cars, in passing rapidly over curves in the road, lurch, rock, or swing, and that this is unavoidable. * * *
>
> "It is true that the plaintiff and one of his witnesses express the opinion that the rocking or lurching when the plaintiff was injured was unusual and extraordinary, but they testify to no facts which show that it was unusual or extraordinary. * * * The mere fact that the plaintiff, who did not have hold of anything, was thrown or fell in the way he described does not show that the movement of the train was unusual."

A similar case is *Foley v. B. & M. R. R.,* 193 Mass. 332, 79 N. E. 765, 7 L. R. A. (N. S.) 1076. Witnesses described the speed of the train at the time of passing over a cross-over switch as "swift", and the jar

or lurch as "quite violent", "terrible", "awful", "very severe", and "unexpected". Upon the authority of earlier Massachusetts cases, the court held the evidence insufficient to show any negligent act on the part of the defendant. As to the characterizations of the lurch of the train by the witnesses, the court said:

> "Mere expletive or declamatory words or phrases as descriptive of speed or acts unaccompanied by any evidence capable of conveying to the ordinary mind some definite conception of a specific physical fact, and depending generally upon the degree of nervous emotion, exuberance of diction, and volatility of imagination of the witness, and not upon his capacity to reproduce by language a true picture of a past event, are of slight, if, indeed, they are of any, assistance in determining the real character of the fact respecting which they are used."

See, also, *Denver & Rio Grande R. Co. v. Fotheringham,* 68 Pac. (Colo.) 978, in which it was held that an accident to a passenger presumes the want of care and shifts the burden of proof to the carrier only when the injury results from an accident to the appliances, and *Elliott v. C. M. & St. P. Ry. Co.,* 236 S. W. (Mo.) 17, in which it was held that testimony describing a sudden movement of the train as "an awful jolt and jar", and "the worst I ever witnessed", in itself was insufficient to sustain a verdict.

The decision of this court in *Southern Pacific Company v. Hanlon,* 9 Fed. (2nd) 294, is in entire

harmony with the cases discussed. In the *Hanlon* case proof of an accident to a passenger, resulting from a sudden jerking of the train, was held sufficient to shift the burden of proof to defendant, but it appeared without contradiction that there was an occurrence which interrupted the normal handling of the train. Something had happened to the train which does not happen in the ordinary course of train operation. There was a very sudden stop as the result of an application of the emergency brakes. The court held that this required explanation and left to the jury the sufficiency of defendant's explanation.

The point stressed by these cases is that the burden of proving negligence when there was no accident to the train, is upon the passenger, and that this burden is not sustained by proof of a sudden or even violent lurch or jerk which might as well be attributable to the normal movement of the train as to negligent operation. Where the record has nothing but the injured person's description of the lurch, even though characterized as an unusual or violent movement, common knowledge that such movements are unavoidable in normal train operation, makes this proof inadequate; to submit the issue to the jury in such circumstances is to leave the matter to conjecture. *Norfolk & Western R. Co. v. Birchett, supra.* When it also apears, as it does in many of the cases, that others in the train were

not affected by the lurch complained of, and that the train continued on its way without notice of the incident, the question of negligence is no longer even conjectural; the necessary conclusion is that the lurch or jar was merely an incident of the usual train operation.

In *Delaney v. Buffalo etc. R. Co., supra,* the court noted the fact that the jolt had not disturbed the dishes in the buffet end of the car and that no other person had been disturbed. It was held that in such circumstances "there is no presumption of negligence arising from the use of the words 'sudden jerk'." The same rule was applied in *Nelson v. Lehigh Valley R. Co.,* 50 N. Y. Supp. 63, where the evidence showed that no one but the plaintiff had fallen as the result of the sudden lurch complained of.

In the case at bar the record shows no interruption to the operation of the train at the time of plaintiff's accident. No other passenger is shown to have been affected in any way by the sudden movement complained of. Two passengers riding in the car next to the one from which plaintiff fell, knew of nothing out of the ordinary until told of the accident. (Record, pp. 214, 238). None of the train crew knew of any unusual jar or jerk prior to the time when the engineer was signaled to stop after plaintiff had fallen from the train. In fact,

the Pullman conductor, who was interested in seeing that the passengers enjoyed themselves (this was a special train carrying a party of Knights Templar to a convention), stated that dancing continued in the parlor car in the middle of the train without any interruption, and that his first word of any accident came when the train stopped at Saco station. (Record, p. 271).

There was evidence given on behalf of plaintiff by other passengers in the observation car at the end of the train and in the adjoining sleeping car, of a jerk, or rather of two jerks, severe enough to be noticed. There is no corroboration of plaintiff's statement in this testimony, however. Immediately after plaintiff fell from the train the brakeman who saw him fall signaled the engineer to stop the train. The brakes were applied and the train came to a stop, and after starting up again a second stop considerably more sudden than the first was made. The jerks described by the passengers testifying for plaintiff (if these characterizations can be given any greater weight than the statement of plaintiff himself), clearly were those resulting from the sudden application of the brakes after plaintiff's accident became known. (Record, pp. 283, 214, 224, 225, 244, 245, 263). We summarize below the statements made by these witnesses:

Two passengers who were riding on the rear platform of the observation car, learned of the accident

to plaintiff when a brakeman came through the car and stated that a man had fallen from the train. Immediately before that these passengers noticed a lurch of the train. One of them states that "the movement caused me to go forward in my chair" (Record, p. 39); the other said that he noticed a change in the rhythm of the train's progress and abrupt change in the motion of the train (Record, pp. 67, 74).

Three passengers were playing cards in a compartment in the car next ahead of the observation car. Someone opened the door of their compartment and told them that a passenger had fallen from the train. Just a few seconds before this announcement there was a jerk or lurch of the train. One of these witnesses described it as "a rather violent lurch—a lurch forward" (Record, p. 81); another said that it was severe enough to throw her forward against the card table and that only the card table stopped her from falling to the floor (Record, p. 62); the third said that there was a very heavy lurch which kind of upset the card game, just prior to the time when they were told that a passenger had fallen from the train (Record, pp. 148, 149).

The cases to which we have referred make clear that the statements of these witnesses can be given no greater weight than the statement of plaintiff himself. It would be pure conjecture to say from

their testimony that the jerk or forward lurch described was not one which might be encountered on any fast passenger train, but was instead explainable only as the result of improper operation.

In any event, the record shows that immediately after plaintiff's fall from the train the brakeman pulled the signal cord and the engineer at once brought the train to a stop. Not receiving any explanation of the signal, the engineer started the train; immediately another signal was given and the train was again stopped, this time rather suddenly. Obviously, the jerking and lurching forward described by these witnesses and said by them to have been noticed immediately before they were told of plaintiff's accident, was that which followed the stopping of the train. Under these circumstances the jury could not properly be permitted to conjecture that the movement described by these passengers might possibly be the lurch which plaintiff claimed had preceded his fall from the train. No causal connection appeared between the movement described by these witnesses and the accident to plaintiff; on the contrary, there is a compelling inference that the jerks they described came from the sudden stopping of the train after it had become known that plaintiff had fallen from the train.

We submit, therefore, that the record contains no substantial evidence to show negligence in the handling of the train. At most, plaintiff's claim in

this respect is supported only by his statement that he fell because of an unusually severe lurch of the train. The movement described, even though characterized as unusual, was not one explainable only upon the assumption that there had been defective or improper train operation. The burden of proof to show negligence of this kind was upon plaintiff and his testimony was inadequate to sustain that burden.

(b) Alleged Lurch Not Proximate Cause of Accident:

What has been said accepts at full face value the statement of plaintiff that he fell or was thrown from the train following the lurch he described, and takes no notice of the fact that there was an eye witness to the occurrence. In examining the question of proximate cause, however, the court will find that there are serious gaps in the account given by plaintiff, and of necessity the test to be applied—whether there is any substantial evidence in the record to connect plaintiff's fall with the lurch of the train complained of—requires consideration of the testimony of the eye witness to the accident. To the extent that the testimony of this witness conflicts with that given by plaintiff, it was properly disregarded by the trial court upon defendant's motion for a directed verdict and is not to be considered here. To the extent, however, that this testimony explains and supplements rather than contradicts

plaintiff's story of his accident, it was entitled to full consideration in determining what is shown by the record and whether there was substantial proof of the charge that plaintiff was thrown from the train.

The fact that this eye witness was an employe of defendant does not change the situation. Unless there were circumstances which justified countervailing inferences or which suggested doubt as to the truth of the testimony, or unless the evidence was of such nature as fairly to be open to challenge as suspicious or inherently improbable, it was entitled to full credit and the trial court could not properly disregard it or submit the case to the jury upon the assumption that the jury was at liberty to disbelieve it because it came from an employe of defendant.

This is the rule of *Chesapeake & Ohio Ry. Co. v. Martin,* 51 Sup. Ct. 453, decided April 13, 1931. In this case the Supreme Court said:

> "We recognize the general rule, of course, as stated by both courts below, that the question of the credibility of witnesses is one for the jury alone; but this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of view is it open to doubt."

The decision of the Supreme Court in this case leaves no room for doubt that testimony of an employe of a party which is positive and direct and

not incredible upon its face, must be accepted. And if the record, with due consideration given such testimony, has no substantial support for plaintiff's claim, the trial court should direct a verdict for defendant. We quote below the Supreme Court's review (in *C. & O. Ry. Co. v. Martin, supra*) of the cases upon this question:

> "It is true that numerous expressions are to be found in the decisions to the effect that the credibility of an interested witness always must be submitted to the jury, and that that body is at liberty to reject his testimony upon the sole ground of his interest. But these broad generalizations cannot be accepted without qualification. Such a variety of differing facts, however, is disclosed by the cases that no useful purpose would be served by an attempt to review them. In many, if not most, of them, there were circumstances tending to cast suspicion upon the testimony or upon the witness, apart from the fact that he was interested. We have been unable to find any decision enforcing such a rule where the facts and circumstances were comparable to those here disclosed. Applied to such facts and circumstances, the rule, by the clear weight of authority, is definitely to the contrary. Hauss v. Lake Erie & W. R. Co. (C. C. A.) 105 F. 733; Illinois Cent. R. Co. v. Coughlin (C. C. A.), 132 F. 801, 803; Hull v. Littauer, 162 N. Y. 569, 57 N. E. 102; Second Nat. Bank v. Weston, 172 N. Y. 250, 258, 64 N. E. 949; Johnson v. N. Y. C. & H. R. R. R. Co., 173 N. Y. 79, 83, 65 N. E. 946; St. Paul Cattle Loan Co. v. Houseman, 54 S. D. 630, 632, 224 N. W. 189; M. H. Thomas & Co. v. Hawthorne (Tex. Civ. App.), 245 S. W. 966, 972; Dunlap v. Wright (Tex. Civ. App.),

280 S. W. 276, 279; Still v. Stevens (Tex. Civ. App.), 13 S. W. (2d) 956; Marchand v. Bellin, 158 Wis. 184, 186, 147 N. W. 1033. Of like effect, although in a different connection, see, also, Roberts v. Chicago City Ry. Co., 262 Ill. 228, 232, 104 N. E. 708; Veatch v. State, 56 Ind. 584, 587, 26 Am. Rep. 44; Marq., Hought. & Ont. R. R. v. Kirkwood, 45 Mich. 51, 53, 7 N. W. 209, 40 Am. Rep. 453; Berzevizy v. D., L. & W. R. R. Co., 19 App. Div. 309, 313, 46 N. Y. S. 27; Miller's Will, 49 Or. 452, 464, 90 P. 1002, 124 Am. St. Rep. 1051, 14 Ann. Cas. 277.

"In Hull v. Littauer, *supra,* the doctrine that the question of credibility of a witness must be submitted to the jury was held to be not an inflexible one, even though such witness be a party to the action. In that case the defendants moved for direction of a verdict in their favor, which was resisted by plaintiff on the ground that the proof upon which the motion was based rested upon the evidence of interested parties. The court, nevertheless, sustained the motion. On appeal, the state Court of Appeals affirmed this judgment, saying (page 572 of 162 N. Y., 57 N. E. 102):

" 'It is true that the evidence to establish the entirety of the contract was given by the defendants, but the rule which the plaintiff invokes is not applicable to such a case as this. Generally, the credibility of a witness who is a party to the action, and therefore interested in its result, is for the jury; but this rule, being founded in reason, is not an absolute and inflexible one. If the evidence is possible of contradiction in the circumstances; if its truthfulness or accuracy is open to a reasonable doubt upon the facts of the case, and the interest of the witness furnishes a proper ground for hesitating to accept his state-

ments,—it is a necessary and just rule that the jury should pass upon it. Where, however, the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities, nor, in its nature, surprising or suspicious, there is no reason for denying to it conclusiveness. Though a party to an action has been enabled, since the legislation of 1857 (chapter 353, Laws 1857), to testify as a witness, his evidence is not to be regarded as that of a disinterested person, and whether it should be accepted without question depends upon the situation as developed by the facts and circumstances and the attitude of his adversary. In Lomer v. Meeker, 25 N. Y. 361, where the defense to an action upon a promissory note was usuary, and the indorser gave the evidence to establish it without contradiction, it was said that "it was the duty of the court in such case to dismiss the complaint, or nonsuit the plaintiff, or direct a verdict for the defendants. It is a mistake to suppose that, because the evidence came from the defendant, after the plaintiff had rested, the case must go to the jury. * * * The argument is that this could not properly be done, because there was a question of credibility raised in respect to the witness Bock, who proved the usury. But this objection is untenable. The witness was not impeached or contradicted. His testimony is positive and direct, and not incredible upon its face. It was the duty of the court and jury to give credit to his testimony." More recently, in Kelly v. Burroughs, 102 N. Y. 93, 6 N. E. 109, Judge Danforth, after observing that, as the facts were not disputed, there was no occasion to present them to the jury, said "the mere fact

that the plaintiff, who testified to important particulars, was interested, was unimportant in view of the fact that there was no conflict in the evidence, or any thing or circumstance from which an inference against the fact testified to by him could be drawn".'

"In Hauss v. Lake Erie & W. R. Co., *supra,* a direction of the trial judge to find for the defendant was sustained, although the motion rested upon the testimony of the conductor of the train. The court put aside the objection that the witness was an employee of the defendant and had an interest to show that he had performed his duty and a motive falsely to represent that he had done so, saying (page 735 of 105 F.):

"'The testimony of the witness was not contradicted by that of any other witness, nor was it brought in question by the cross-examination nor by the admitted facts of the case; and, outside of the suggested interest and motive, there is not a fact or circumstance in the case which tends to raise a doubt as to the truth of his testimony.'

"And at page 736 of 105 F.:

"'* * * Nor do the facts and circumstances of the case justify an impeaching presumption against the credibility of the witness, founded upon his mere relation to the parties and to the subject-matter of the controversy, which should overcome the counter presumption that, as an uncontradicted witness, testifying under oath, he spoke the truth.'

"In M. H. Thomas & Co. v. Hawthorne, *supra,* at page 972 of 245 S. W., the rule is thus stated:

"'A jury cannot arbitrarily discredit a witness and disregard his testimony in the absence of any equivocation, confusion, or aberration in

> it. It is not proper to submit uncontradicted testimony to a jury for the sole purpose of giving the jury an opportunity to nullify it by discrediting the witness, when nothing more than mere interest in the case exists upon which to discredit such witness. The testimony must inherently contain some element of confusion or contrariety, or must be attended by some circumstance which would render a total disregard of it by a jury reasonable rather than capricious, before a peremptory instruction upon the evidence can be said to constitute an invasion of the right of trial by jury. That it is proper for a trial court to instruct a verdict upon the uncontradicted testimony of interested parties, when it is positive and unequivocal and there is no circumstance disclosed tending to discredit or impeach such testimony, can be said to be a settled rule in Texas'."

The testimony of the brakeman who witnessed the accident to plaintiff in the case at bar, supplied certain important facts as to which plaintiff's testimony was silent; it gave the detail which was missing from plaintiff's story. The court will search the record in vain for any circumstance which throws the slightest suspicion or doubt upon the testimony of this witness. It was direct and positive, entirely credible upon its face, and in the main uncontradicted. Therefore upon a motion for directed verdict, it was the duty of the trial court to give this testimony equal weight with plaintiff's testimony, in determining whether there was any substantial evidence in the record to support the charge that

plaintiff fell from the train as the result of a sudden and unexpected lurch or jerk. We summarize below the testimony of plaintiff and of the eye witness to the accident, upon this question.

Plaintiff's statement is that he lunged forward after a sudden lurch of the train. His story as to what happened next is as follows (Record, p. 98):

> "I don't remember whether I struck the train or not, but I didn't have any feeling of striking anything or touching anything, but I just felt myself going, and I wondered where I would strike, wondered what it was like out there. You know how a man will do when he is going through space, and wondering what he is going to strike on. You live a long time there in a few seconds, and that is what I did. That is the last I can remember."

In response to a question from his counsel as to the last thing he could remember *before the accident,* plaintiff said(Record, p. 98):

> "I was going through space. Practically that is the only way I can express it."

It will be remembered that immediately before plaintiff was walking from one car to another, presumably on a line approximately equally distant from the right and left vestibule doorways; he was about to enter the door of the sleeping car itself when the accident happened. To leave the train through the left vestibule doorway it was necessary to proceed several steps, perhaps three or four feet, to the left in order to get from the middle of the car

platform to the left doorway. The vestibule space to be traversed is narrow; there are objects on each side, a handhold, brake lever, etc., and the entire vestibule space was well illuminated by a dome light.

Plaintiff has no explanation whatsoever of his movements from the time he lunged forward. He was then not near the left vestibule opening but was in the middle of the platform about to enter the car. Unless there was a mental lapse at this moment there would seem to be no reason why plaintiff could not explain how he traversed the platform from its center to the left edge, and particularly how he got through the opening without touching objects on either side and without making any effort to save himself. Upon direct examination plaintiff was asked whether he observed anything "except the ordinary lights of the vestibule." His answer was that he had noticed only "just the ordinary passage between the cars." (Record, p. 99). He did not observe that a vestibule door was open and did not see anyone standing in the doorway. (Record, p. 98). He did not undertake to deny that the brakeman might have been standing in the vestibule but merely said that "if there was any in there I didn't know; I didn't see him." (Record, p. 109). And when asked in the course of the medical examination for an explanation of the accident, he stated that he was walking along the aisle of a moving train

and suddenly remembered nothing until he awoke in the hospital. (Record, p. 169).

The brakeman's testimony is that he had opened the vestibule preparatory to and as a part of a necessary train operation, leaving the trap or floor covering the steps leading from the platform, in place. (Record, pp. 273, 281). There was a lighted dome light overhead so that the vestibule was well illuminated. (Record, pp. 279, 300). From the time of opening the vestibule door until the moment of the accident, the brakeman stood practically in the center of the opening so that until he moved aside, it would have been impossible for anyone to get through the opening, at least if moving involuntarily, without striking him. (Record, p. 281, Exhibits C to J, inclusive).

None of this testimony is in conflict with that given by plaintiff. His statement is that he lunged forward (as the result of a lurch of the train) while walking toward the entrance to the sleeping car. He knew nothing of the circumstances described by the eye witness and did not undertake to deny them. We exclude from this review of the brakeman's testimony his statement that while standing in the vestibule doorway a hand was laid on his arm, and that when he turned to see what was wanted, plaintiff walked past him and stepped off the train. This was denied by plaintiff on rebuttal; plaintiff stated

that it was not the fact that he had walked or stepped from the train. (Record, p. 328).

This is the record which was before the trial court at the time of the motion for a directed verdict, and the question for consideration here is whether there is in this record any substantial evidence from which it may fairly be inferred that the "lunge forward" which plaintiff described, was responsible for his fall from the train. Of first importance is the fact that plaintiff offered no explanation of his fall from the train other than that the statement that as he was walking toward the entrance of the sleeping car he lunged *forward,* that is, in the direction in which he had been walking, and then was conscious of going through space. Whether this statement, considered apart from the testimony later introduced by defendant, would support the desired inference that he fell out the left vestibule doorway as the result of this lunge forward, might well be doubted.

But when plaintiff's statement is tested in the light of facts proven by uncontradicted testimony of an eye witness, the inference plaintiff seeks to draw and upon which his case rests, is utterly impossible. These facts—the well lighted vestibule, with the trap or platform over the steps in place, the handhold and brake lever available on each side of the narrow space, the distance to be traversed over the platform

from the center line of the train to the vestibule doorway, and, finally, the presence of the brakeman in the doorway in a position that required him to move to one side to permit anyone to pass—preclude the possibility of an inference that the lurching of the train actually lifted plaintiff into the air so that he was hurtled across the platform and through the vestibule doorway without touching any of the objects on either side, or the man whose body blocked the opening.

It must be kept clearly in mind that plaintiff's case is wholly dependent upon this inference. There was no testimony that he had stumbled down unguarded steps or that his loss of balance at the time of the "lunge forward" caused him to pitch sideways across the platform and out the left vestibule doorway. No attempt was made to prove any of the circumstances (and if plaintiff was in possession of his senses these circumstances must have been known) to connect the lunge forward with the fall from the train. Nothing was shown which could justify a finding that the condition of the vestibule, the trap or platform covering the steps, and the position of the brakeman were not exactly as the brakeman described them. The case rests upon the statement that at one moment plaintiff was lunging forward in the middle of the car platform, and the next moment was in the air moving through space away from the train. Obviously, some explanation of this

is necessary. The facts are given by the uncontradicted testimony of the brakeman, and in the light of these facts the inference upon which plaintiff relies to connect his accident with the alleged negligence, was not one which the jury could be permitted to draw.

The facts shown by the record strongly suggest that plaintiff must have paused in his walk from one car to the other and then, momentarily losing his sense of direction, proceeded through the left vestibule doorway, touching the arm of the brakeman as a request to be allowed to pass, in the belief that he was entering the car itself. But defendant's right to a directed verdict did not turn upon its ability to explain just how plaintiff came to fall from the train. Plaintiff had the burden of proof, and if his evidence failed to sustain his theory that a lurch of the train not only caused him to lunge forward but actually lifted him into the air and catapulted him through the narrow space from the center of the car platform to and through the vestibule doorway, without touching any of the objects on either side or the man whose body blocked the opening, then the injuries resulting were not sufficiently connected with the alleged negligence and a directed verdict should have been granted.

We are not called upon to determine whether plaintiff stepped from the train as the result of a momentary mental lapse, as might be inferred by

his own statement during the medical examination. We are concerned here with the sufficiency of his proof in the light of the uncontradicted facts, brought into the record by defendant, to establish the proximate cause claimed. These facts make impossible the desired inference that plaintiff was thrown sideways through the vestibule doorway as the result of the forward lurch of the train. Without this inference there is no connection between the accident to plaintiff and the negligence alleged. If, notwithstanding the weight of authority to the contrary, the "unusual" lurch of the train can be considered presumptively negligent, a verdict for defendant should nevertheless have been directed for lack of proof that the alleged negligence relied upon was the proximate cause of the fall from the train.

(c) Negligence Not Inferable from Opening of Vestibule Doorway:

The claim of the complaint that a condition unsafe and dangerous to passengers was created by opening the vestibule doorway and that this opening was left unlighted and unguarded, and that no notice of this danger was given plaintiff, rests solely upon the fact that plaintiff left the train through this vestibule doorway. His own account of the accident includes no affirmative testimony as to the condition of the vestibule,—whether the trap cover-

ing the platform was in place, whether the vestibule was lighted, or whether the brakeman was in the opening. As to these matters he testified that he noticed only "the ordinary passage between the cars." (Record, p. 99).

The fact that plaintiff left the train through the vestibule doorway proves that the door was open, but does not prove that the vestibule was unlighted or that the opening was unguarded. Plaintiff's account of the accident permits of no inference as to this, because he professes to have noticed nothing prior to the lurch of the train, and thereafter, and following his "lunge forward", he was conscious only of going through space. This showing—the fact of the accident and the testimony given by plaintiff—leaves the matter open to conjecture; how plaintiff got from his place of safety across to the left vestibule door, whether the vestibule was lighted in the usual way, and whether there was anyone else there, are matters of speculation and no inference either way is justified.

But the record has other testimony which explains exactly what occurred. It is important to note that this testimony while in conflict with plaintiff's theory of liability, is not in conflict with plaintiff's testimony. The vestibule door had been opened, it is true, but for a necessary operating purpose. The trap covering the car steps was in place and the vestibule brightly lighted, and a brakeman stood in

the opening in the performance of his duty. These are proven facts, not contradicted either by what plaintiff said in his testimony or by the fact that he actually got by the brakeman and left the train through the vestibule opening. Plaintiff attempted a contradiction of the brakeman's statement as to just how this was accomplished; on rebuttal he was asked the single question whether it was true that he walked or stepped from the train and he answered that "It is not true." (Record, p. 328). In all other particulars the brakeman's testimony stands unchallenged, and must be accepted as fact under the rule of *C. & O. Ry. Co. v. Martin, supra.*

We are not unmindful of the fact that testimony was given by two passengers on the train to the effect that both the vestibule door and the trap were open. (Record, pp. 80, 147). But these witnesses were speaking of the condition they observed after the accident. A third witness noticed the open vestibule, but could not say whether the trap was open. (Record, pp. 59-60). These passengers had been playing cards in a compartment and when told of the accident went back to the observation car; when passing from one car to the other they noticed the open vestibule doorway. Immediately after the accident and before these people had reached the vestibule, signals had been given the engineer and the train was coming to a stop; the occupants of both the observation car and the sleeping car adjoining

had been told of the accident and several got off as soon as possible, perhaps without waiting for the train to come to a full stop, to go to plaintiff's aid. Obviously the conditions prevailing after the accident, with the train crew and passengers about to alight to seek for and to help the injured man, do not support the contention (if such contention is actually made) that the trap was open and the car steps unguarded at the time plaintiff fell from the train.

On this record it is impossible to infer negligence from the fact that the vestibule door was open while the train was still in motion, or from the fact that plaintiff in some manner left the train through the vestibule doorway. Necessarily vestibule doors must be opened occasionally for purposes of normal train operation even while the train is still in motion. Negligence cannot be inferred from this, at least when it appears that the train employe opening the vestibule remained at the opening; and the fact that some danger results to passengers even with the opening thus guarded, is not in itself sufficient to prove negligence.

Tudor v. Northern Pacific Ry. Co., 124 Pac. (Mont.) 276.

Union Pacific R. Co. v. Brown, 84 Pac. (Kan.) 1026.

Gayle's Administrator v. L. & N. R. Co., 173 S. W. (Ky.) 1113.

Amyot v. D. S. S. & A. Ry. Co., 214 N. W. (Mich.) 140.

Whether the brakeman's version of plaintiff's fall from the train be accepted or whether the matter be left to conjecture, there can be no dispute over the fact that when the accident happened the vestibule was brightly illuminated, the trap covering the car steps was down in place, and the brakeman was standing in the vestibule doorway, his body partly blocking the opening. He was engaged at the moment in the performance of a duty incident to train operation; he was looking out watching for the moment of passing the switch leading to the side track so that he might alight and close the switch. In this situation the fact that the vestibule door was open and that plaintiff in some manner got past the brakeman and fell from the train, implies no neglect of duty on the part of the carrier.

Appellant respectfully submits that the record presented to the trial court upon defendant's motion for directed verdict, had no substantial evidence to support any of the charges of negligence made by plaintiff. Defendant's motion should have been granted for this reason, and for the further reason that the occurrence upon which chief reliance was placed, whether negligent or not, was not shown to be the proximate cause of plaintiff's accident.

II.

At the close of the testimony, and after its motion for a directed verdict had been overruled, defendant requested the court to instruct the jury that there was an entire failure of proof of the charge of excessive speed in the operation of the train, and also that there was no evidence to support the claim that the steps leading from the car platform had been left open and unguarded. At the same time defendant asked the court to withdraw from consideration by the jury the charge of negligence in causing a lurch of the train, and the claim that the vestibule doorway had been improperly left open and unguarded. These requests were all denied.

We have discussed at length in the argument directed to the merits, the inadequacy of the evidence to sustain the claims of negligence in respect of the lurching of the train and the opening of the vestibule doorway. Appellant maintains that the record has no substantial evidence to support either of these charges of negligence and that the trial court erred in not withdrawing them from consideration by the jury, if upon any theory the case could properly have been submitted to the jury at all. There remain for consideration the specifications of error based upon the refusal of the trial court to instruct the jury that there was an entire failure of proof of the charges that (1) the speed of the train was ex-

cessive, and (2) that the steps leading from the car platform had been left open and unguarded.

Lack of Evidence of Excessive Speed:

The charge of excessive speed, as it appeared in the complaint originally, had reference to the movement of the train from the main track to the siding at Saco station. The train was thought to have lurched because it took the siding at an unduly high speed. In preparing for the trial, however, plaintiff's attorney found that the accident had occurred before the train had reached the siding, and the complaint was amended to charge a "high and dangerous and excessive rate of speed" in view of the fact that the train was then "approaching and about to enter upon and about to take a siding." (Record, pp. 5, 33).

It is questionable if the allegation in this form charges any breach of duty on the part of the carrier. The amendment apparently charges excessive speed as a ground of negligence, in addition to the alleged rough handling of the train, but the circumstances described,—the anticipated stop for the purpose of entering a siding,—suggest no reason for reducing speed while the train was still on the main line some distance away from the siding.

At any rate, no proof was made of any unusual or excessive speed in circumstances which required

slower operation. Expressions of the witnesses were that before the accident the train was running "at a good speed on a comparatively straightaway" (Record, p. 40); "we had been running rather fast, and were slowing down" (Record, p. 55); "they had been making about thirty-five miles an hour" (Record, p. 219).

Of course there is nothing in this testimony to justify any inference of negligence. Nothing more than ordinary train operation was shown, and since prior to the time of the accident no circumstance or condition appeared which necessitated slow running, there was no duty to operate the train at any lower rate of speed than that described by the witnesses.

Smith v. Chicago, N. S. & M. R. R., 193 N. W. (Wis.) 64.

Hoskins v. Northern Pacific Ry. Co., 102 Pac. (Mont.) 988.

While the jury was not directed to consider the speed of the train as an independent ground of negligence, the instructions given permitted the jury to find that negligently excessive speed was a factor in bringing about the lurch of the train complained of. (Record, p. 330). This clearly was error. The testimony quoted falls far short of proving any negligence in the matter of speed, and the court should have directed the jury, as requested by defendant, that the speed of the train was not an element to be considered.

Insufficiency of Proof of Open and Unguarded Car Steps:

The issues submitted to the jury did not specifically include the contention that the trap covering the car steps had been raised and the steps left open and unguarded. (Record, pp. 330, 334). However, this claim was made in the complaint (Record, pp. 5-6), and testimony designed to prove it was offered and received in evidence.

We have already reviewed this evidence and have pointed out that the circumstances made it of no value as proof of the condition prevailing at the time of the accident (*ante*, p. 42). When the passengers giving this testimony observed the vestibule and car steps, the train was coming to a stop. Many of those on board had learned of the accident and were preparing to alight as soon as possible in order to find plaintiff and give him help. The fact that the trap covering the steps may then have been up and the steps open cannot justify an inference that this condition prevailed when the accident happened.

This was the only evidence offered in support of the contention that the car steps were open and unguarded when plaintiff undertook to go through the vestibule from the observation car to the sleeping car. There was nothing whatsoever in plaintiff's story of his accident to support an inference upon this point. The facts must have been obvious to him

as he walked through the vestibule, but he noticed nothing and apparently could not tell whether in leaving the train he went down the car steps or across the trap or platform and out the opening above the trap covering the steps. The brakeman's uncontradicted testimony is that the trap had not been raised at all prior to the accident, and that he in fact was standing upon the trap covering the steps when plaintiff came through the vestibule.

Upon this record there was an entire failure of proof of the charge made in the complaint. If upon any theory there was a fact issue as to the lurch of the train or as to the opening of the vestibule door, the case should not have gone to the jury without defendant's requested instruction withdrawing from their consideration any question as to the condition of the car steps.

CONCLUSION

The judgment appealed from in this case imposes liability upon appellant in the sum of $18,480.00 for an accident which appellant could not possibly have prevented. The record clearly indicates that the jury was permitted to base its verdict upon the fact that plaintiff had fallen or had inadvertently stepped from a moving train, and that this had been made possible by a member of the train crew who had opened the vestibule door.

Appellant owed plaintiff and his fellow passengers a high degree of care in the operation of the train upon which they were riding, but it was not an insurer of their safety. The judgment in this case in practical effect holds appellant to the obligation of an insurer. If a presumption of negligence can possibly be said to have arisen from the fact that the accident was made possible by the opening of the vestibule doorway, any such presumption became, in the light of the direct, positive and uncontradicted testimony of the train employe responsible, a mere scintilla of evidence wholly inadequate to support a verdict.

The untimely death of the Honorable Robert S. Bean, after the submission of defendant's motion for a new trial and before the motion had been passed upon, deprived defendant of its opportunity to secure a careful and painstaking review of the record by the judge who had listened to the testimony. There was, of course, but a limited opportunity for such a review of the evidence when defendant's motion for a directed verdict was disposed of at the trial. Appellant believes that an examination of the record would have convinced the trial judge that there was no substantial evidence to sustain plaintiff's charges of negligence.

Through the death of the trial judge defendant also lost the right to a review, by the judge who heard the testimony, of the award of damages. Ap-

pellant believes that the verdict is so excessive as to indicate passion and prejudice on the part of the jury. Whether this is so is a question difficult to answer upon the record alone; ordinarily an appellate court has the benefit of the views of the trial judge who has granted or refused a new trial. Here the defendant's motion was necessarily disposed of upon the record alone, and the case comes here with nothing to indicate whether or not the trial judge who heard the case considered the verdict excessive. For this reason we shall not urge here the specification of error based upon the excessive award made by the jury.

Respectfully submitted,

CHARLES A. HART,
FLETCHER ROCKWOOD,
CAREY, HART, SPENCER & MCCULLOCH,
Attorneys for Appellant.